In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-83

LT. JOHN A. STRAIT, PETITIONER

v.

HON. MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below on rehearing (Pet. App. A1) and the court's initial opinion (Pet. App. A2) are not yet reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on June 4, 1971. The petition for a writ of certiorari was filed on July 15, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court lacked habeas corpus jurisdiction

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under this Court's ruling in *Schlanger* v. *Seamans*, 401 U.S. 487.

2. Whether the district court had jurisdiction under the mandamus provisions of 28 U.S.C. 1361 or under other statutes.

STATEMENT

Petitioner was commissioned a Second Lieutenant in the Military Police Corps of the United States Army Reserve in June 1966 after successfully completing the Army Reserve Officer Training Course at the University of California. Thereafter, he was permitted to defer his active duty obligation in order to enroll in and complete a course of studies at Yale University Law School in New Haven, Connecticut (R. 186–187). Upon graduation from law school in June 1969, he returned to California to take the bar examination.

As a reserve officer with a deferred active duty obligation, petitioner was not required to attend monthly drills or summer encampments. He was assigned at all times during the delay in active service to the United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, Indiana.

On June 7, 1969, petitioner accepted a promotion to First Lieutenant. On July 18, 1969, petitioner took a medical examination and was found physically fit to enter active duty.

Petitioner was notified on July 9, 1969, to report to Fort Gordon, Georgia, on February 9, 1970, to fulfill

his two year active duty obligation. On January 20, 1970, about three weeks before his scheduled arrival at Ft. Gordon, he applied for a discharge as a conscientious objector. Pursuant to Army regulations, the application was submitted to the United States Army Reserve Component Personnel Center (RCPC) at Fort Benjamin Harrison, Indiana. Interviews and hearings in processing the application were conducted at Fort Ord, California, and the record was forwarded to the Conscientious Objector Discharge Review Board at Fort Benjamin Harrison. The Board recommended that the application for discharge be disapproved because of petitioner's lack of sincerity, and on April 7, 1970, the RCPC Commander, Colonel John H. Hoffman, disapproved the application (R. 187).

Petitioner's orders to report to Ft. Gordon on February 9, 1970, were changed in October 1969; pursuant to his request for additional time to take the bar examination. On March 5, 1970, he was again ordered to report to Fort Gordon on April 13, 1970. Petitioner initiated this habeas corpus action on April 9, 1970, four days before the date he was required to report, in the United States District Court for the Northern District of California (R. 250–251).

On April 10, 1970, the district court issued a show cause order and directed that petitioner remain within its jurisdiction and not be assigned duties inconsistent with the provisions of AR 135–25 (R. 106). The government responded by asserting that the district court lacked jurisdiction (R. 186) since petitioner was assigned to the United States Army Reserve

Component Center at Fort Benjamin Harrison, Indiana, and, therefore, was not in custody in, nor was his custodian in, the court's judicial district in California. The court held that it had jurisdiction of petitioner's claim, but denied petitioner's application for writ of habeas corpus on the merits (R. 233–A), and, after further argument, declined to reconsider its decision (R. 251).

The court of appeals originally held that the district court had jurisdiction over petitioners' claim, but reversed its decision on the merits (Pet. App. A2). On March 3, 1971, the government petitioned for rehearing on the basis of this Court's decision in *Schlanger* v. *Seamans*, 401 U.S. 487. Petitioner argued that *Schlanger* was not applicable and, as an alternative to habeas corpus jurisdiction, asserted that the district court had jurisdiction under the mandamus provisions of 28 U.S.C. 1361. On June 4, 1971, the court below entered a new opinion holding that under *Schlanger* the district court lacked jurisdiction since petitioner's custodian was not within the court's judicial district and rejected petitioner's mandamus argument, and remanded the case to the district court with directions to dismiss for want of jurisdiction (Pet. App. A1).

ARGUMENT

1. Petitioner alleges at the outset that this Court's decision in *Schlanger* v. *Seamans*, *supra*, is factually and legally distinguishable and, therefore, is not controlling. But here, just as in *Schlanger*, petitioner's

commanding officer was neither a resident of the judicial district in which he brought suit nor amenable to its process. In this situation, as the court below held (Pet. App. A1, 41), *Schlanger* plainly applies: the California District Court had "no custodian within its reach against whom its writ can run," which "is fatal to the jurisdiction" of that court (401 U.S. 491).

This does not mean, however, that petitioner could not maintain a habeas corpus action at all. As stated above (p. 2, *supra*), he was assigned during the delay in active service to the Reserve Components Personnel Center under the command of the RCPC Commander, in Indiana; he could have brought a habeas corpus suit there. Moreover, petitioner was under orders to report to Fort Gordon, Georgia, only four days after he filed suit in California. Once at Fort Gordon, of course, petitioner could meet the habeas corpus jurisdiction requirements for a suit there.[1] In these circumstances, petitioner must adhere to the *Schlanger* rule and bring his habeas corpus action where his custodian is located.[2]

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[1] Petitioner here in effect seeks a rule that would entitle persons who are on deferred status and have completed their schooling to assert habeas corpus jurisdiction wherever they reside, whether temporarily or permanently. In a real sense, such persons are in much the same situation as an active duty serviceman "on leave." The courts have consistently refused to allow servicemen on leave to bring suit in a district other than where their commanding officer is located. *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *Jarrett* v. *Resor* 426 F. 2d 213 (C.A. 9).

[2] We think that there are important differences between *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md.), on which petitioner relies,

2. The mandamus provisions of 28 U.S.C. 1361 did not confer jurisdiction on the district court.

Mandamus is an extraordinary remedy and, as pointed out by the court below, is to be used "only in the most urgent cases" (Pet. App. A1, p. 42). *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831. It is not to be used where there is another remedy available (*Carter* v. *Seamans*, 411 F. 2d 767 (C.A. 5), such as petitioner had here by reason of a habeas corpus proceeding in a proper jurisdiction.[3]

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and the facts of this case. There, a reservist placed on inactive status and deferred while in graduate school brought a habeas corpus action in Maryland, in the judicial district where he had been attending graduate school for several years. According to the district court, Donigian was in Maryland "with permission of the Army," and would "have had to obtain the approval of the Army to transfer to another school" (308 F. Supp. at 453). These and other factors presented a "highly unusual situation" that showed that "the custody of which he [Donigian] complains relates very definitely to this district" (*ibid.*). Unlike Donigian, petitioner was in California, where he brought suit, for only a brief period before active duty, to take the bar examination, and there is no indication that he could not have gone to or lived in any state or number of states, without Army permission, while waiting to do so. Moreover, he was under orders to report for active duty in Georgia virtually from the time he left law school, so that his residence in the interim was assured of being relatively temporary and his final destination was fixed.

[3] Petitioner claims that there is no assurance that an "alternate remedy exists beyond question" (Pet. 30). We think that a habeas corpus action in a proper jurisdiction would have been available and would have provided an adequate alternative remedy (see p. 5, *supra*). While petitioner also contends

Nor could petitioner show, as required for mandamus relief, that the Army has failed to perform a wholly ministerial duty, as to which it has no discretion. See *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9). As in *Jarrett*, the petition here "does not allege that defendants have failed to fulfill a plainly prescribed ministerial duty. It alleges at most that in fulfilling their duty of acting upon his request for a discharge from the Army, they either abused their discretion, incorrectly found the facts, or misapplied the law" (426 F. 2d at 216–217). Cf. *Miguel* v. *Mc Carl*, 291 U.S. 442.

This is not a case like *Bluth* v. *Laird*, where there has been "a clear and unequivocal abuse of discretion" (435 F. 2d 1065, 1071 (C.A. 4)). *Bluth* involved a failure on the part of the Army to follow its own regulations when processing a request for a temporary deferment from overseas duty. The court held that while mandamus is not available to review matters committed to the discretion of the Army, the designated procedures imposed "ministerial" duties so that mandamus would issue to compel their performance. In the present case, petitioner's conscientious objector claim turned on the particular facts presented and involved a large measure of informed discretion, a

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that a habeas corpus proceeding in another state is not an "adequate" remedy (Pet. 31–34), the main thrust of this argument is that it would cost money to go to another state and generally would be more difficult to litigate a case in a different state. Though we agree with the court below that relief by habeas corpus in the federal courts of another state is "another adequate remedy" (Pet. App. A1, p. 42), this should be especially so in the present case, in view of the fact that petitioner was scheduled to be transported to his duty station in Georgia (where all habeas corpus requisites could have been satisfied) at Army expense four days after he brought suit in California.

situation in which plainly there could be no "unequivocal abuse of discretion."

3. The remaining statutory provisions relied on by petitioner (Pet. 35–38) similarly did not confer jurisdiction on the district court. The Administrative Procedure Act (5 U.S.C. 701, *et seq.*) is inapplicable, since by its own terms (5 U.S.C. 704) it provides for judicial review only where the action complained of is "reviewable by statute", or is final action "for which there is no other adequate remedy." Neither condition is met here—there is no review by statute and another adequate remedy (a habeas corpus proceeding in an appropriate jurisdiction) exists (see p. 5, *supra*). *Cf. Mohawk Airlines, Inc.* v. *Civil Aeronautics Board*, 329 F. 2d 894 (C.A. D.C.); *Richfield Oil Corp.* v. *United States*, 106 F. Supp. 1022 (N.D. Cal.), affirmed, 207 F. 2d 864 (C.A. 9); *Poirier* v. *Commissioner*, 299 F. Supp. 465 (E.D. La.).

Nor did 28 U.S.C. 1331(a) grant jurisdiction. Here, petitioner seeks to compel an official to perform a function which he is allegedly obligated, but has failed, to perform. Section 1331 has never served as a jurisdictional basis for relief of this sort, in effect the same that petitioner sought by the extraordinary remedy of mandamus. The cases that petitioner cites (Pet. 37) did not compel an official to do an affirmative act.[4]

[4] While *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), which petitioner also cites, speaks in terms

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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of Section 1331, the court purported to order affirmative action there because the local board acted "in clear excess of its jurisdiction" (372 F. 2d at 826). This, of course, is in effect the mandamus standard, so that *Wolff* may be properly considered as holding only that there might be jurisdiction under Section 1331 where mandamus jurisdiction is otherwise established. That is not the case here.

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